

APPEAL NO. 032471  
FILED NOVEMBER 5, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 19, 2003. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) injury occurred while the claimant was in a state of intoxication, thereby relieving the carrier of liability for compensation; that the employer tendered a bona fide offer of employment (BFOE) to the claimant; and that because the carrier is relieved of liability for compensation and the employer tendered a BFOE, the claimant does not have disability resulting from the injury sustained on \_\_\_\_\_. The claimant appealed, disputing the determinations of the hearing officer. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed as reformed.

We reform that portion of the decision and Conclusion of Law No. 5 to correct a clerical error and change therein from "the Carrier tendered a [BFOE]" to the employer tendered a BFOE.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The definition of intoxication applicable to this case is the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance. Section 401.013(a)(2). As explained in Texas Workers' Compensation Commission Appeal No. 021751, decided August 26, 2002, an employee is presumed sober; however, when the carrier rebuts the presumption of sobriety with probative evidence of intoxication, the employee has the burden of proving that he was not intoxicated at the time of the injury.

A urine specimen was collected from the claimant after his accident at work. The drug test detected cocaine metabolite at the level of 6,206 ng/ml. Further, there was documentary evidence from a toxicologist, which concluded that the claimant suffered from impairment of the normal use of his mental or physical faculties at the time of his workplace accident. The claimant argues that the hearing officer erred in relying on the drug test because the last name reflected on the test is not the same as the claimant's. The carrier notes in its response that the drug test result contained the claimant's social security number and first name and opined that the incorrect last name was the result of illegible handwriting of the claimant contained in the chain of custody document, which was also part of the record. Conflicting evidence was presented on the intoxication issue. The hearing officer found that at the time of the injury, the claimant did not have the normal use of his mental and physical faculties as a result of the voluntary introduction into his body of a controlled substance. The hearing officer is the sole

judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's decision on the intoxication issue is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Since the hearing officer determined the intoxication issue against the claimant, the claimant did not have a compensable injury as defined by Section 401.011(10), and since Section 401.011(16) requires the existence of a compensable injury as a prerequisite to a finding of disability, the hearing officer properly concluded that the claimant did not have disability.

The evidence reflects that a BFOE was tendered to the claimant, which was accepted by the claimant on May 2, 2003. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6(c)) sets out the requirements for a BFOE. In the present case, we find no error in the hearing officer's finding that the employer did make a BFOE to the claimant. However, we do note that the Appeals Panel has stated on numerous occasions that the issues of BFOE and disability are distinct. Texas Workers' Compensation Commission Appeal No. 001143, decided July 3, 2000.

We affirm the decision and order of the hearing officer as reformed.

The true corporate name of the insurance carrier is **THE GRAY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBERT L. WALLACE  
1717 EAST LOOP, SUITE 333  
HOUSTON, TEXAS 77029.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge